17 March 1969

MEMORANDUM FOR THE RECORD

SUBJECT: Director's Meeting with Senator Richard Russell
Re S. 782

1. The Director informed me of his meeting today with Senator Richard Russell regarding the Ervin bill, S. 782, during which Senator Russell said:

a. He had discussed the problem with Bill Darden and Bill Woodruff but was still somewhat at a loss to know what to do about it.

b. He feels that the Agency definitely should not testify in open session and will try to persuade Senator Ervin to hear us in executive session.

c. He feels Senator Ervin's mind is made up and there is little hope of persuading him to change his position.

d. With half of the Senate already sponsoring the bill, the chances of defeating it are dim.

e. We should shorten and rewrite the proposed letter from the Director to Senator Ervin, concentrating mainly on the relevant legal points and avoiding argumentation which might further alienate Senator Ervin.

25X1

2. The Director came away with the impression that Senator Russell feels there is little we can do on the Senate side and that our best bet is to focus our attention on the House side.

[redacted]

JOHN M. MAURY
Legislative Counsel

Distribution:
Original - Subject
1 - DD/S
1 - OGC
1 - Chrono
OLC/JMM:jmd

25X1 11. [redacted] Delivered to Dorothy Fosdick, Staff Director on Senator Jackson's Subcommittee on National Security and International Operations, a blind confidential memorandum in response to the Senator's questions concerning the USSR/ChiCom border disputes. See Journal of 13 March.

25X1 12. [redacted] The Director met with Senator Richard Russell to discuss the Ervin bill, S. 782. See Memo for the Record. 25X1

[redacted]

JOHN M. MAURY
Legislative Counsel

cc:
Ex/Dir-Compt
O/DDCI
DD/I
DD/S
DD/S&T
25X1 [redacted]
Mr. Houston
Mr. Goodwin
OPPB
EA/DDP

DISCUSSION WITH SENATOR RICHARD B. RUSSELL RE S. 782

1. Senator Ervin's bill is the same as last year and we believe it would be detrimental to our personnel security program and to operational security generally.

2. Last year, after Senator Russell suggested that the Director talk to Senator Ervin, the Director saw Senator Ervin on 23 July 1968 but made no headway, although the Senator offered to listen to arguments on legal points.

3. On 24 February 1969 Counsel for the Agency presented the legal points thought to be important in line with a memorandum on points of law previously submitted to Senator Ervin but gained no acceptance from Senator Ervin. (Tab A)

4. On 28 February 1969 the Director wrote asking for an opportunity to present his views to Senator Ervin's Subcommittee in executive session. (Tab B)

5. Senator Ervin wrote back on 4 and 5 March 1969 offering only an open session and saying he would grant no exception for the Agency. (Tab C)

6. The Director proposes to reply that he can not make a full presentation in open session and that he feels an exception for the Agency is necessary. In view of the policy that has existed that the Agency appears before its parent Subcommittees only in closed session, the Director requests guidance from Senator Russell on the problem thus presented by Senator Ervin. (Tab D)

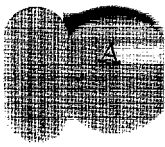
7. Mr. Henderson in the House is working on a bill which we believe would be acceptable to the Agency.

8. Senator Eastland and Senator McClellan are sympathetic to the Agency's position, also Senators Jackson, Bayh and Stennis.

9. Summary of the Agency's problems with S. 782 given to Mr. Woodruff. (Tab E)

10. Copy of S. 782. (Tab F)

11. Our proposal for amendments to S. 782. (Tab G)



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5 September 1968

Legal Effect of S. 1035 on the Intelligence Activities of CIA

1. A memorandum by the American Law Division of the Library of Congress, dated January 29, 1968, concerning the effect of S. 1035 on the Central Intelligence Agency has been recently filed in the Congressional Record (Cong. Rec., 2 July 1968, pp. S8088 and S8089) after being presented to the Senate Subcommittee on Constitutional Rights.

2. The author of the article has conducted considerable research into the statutes which have a bearing on the Agency and its functions. He also cites several cases which have a bearing on the applicability of various laws and legal principles to the functions of intelligence. Unfortunately, however, the author has not had the same opportunity to research the sensitivities of security agencies generally or of Central Intelligence Agency, specifically. It is the purpose of this paper to acquaint those interested in the subject with the actual issues involved and with certain court rulings in other, perhaps lesser known, legal proceedings. This discussion demonstrates that there are inherent in S. 1035 conflicts with statutes and in fact conflicts with judicial concepts of the necessity for secrecy in intelligence matters.

3. The article refers to a number of statutory provisions which it claims were designed to allow CIA to maintain secrecy concerning its operations and personnel. It cites 50 U.S.C. 403(d)(3) as authorizing the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. That statute places a responsibility on the Director of Central Intelligence for protection of intelligence sources and methods but in fact arms him with no authority to carry out that responsibility.

4. Although 50 U.S.C. 403(d)(3) provides no authority to the Director of Central Intelligence for carrying out the obligation which it places upon him to protect intelligence sources and methods, the Supreme Court has steadfastly held to the view that intelligence is a very special subject. As was stated in the Totten case (Totten v. United States, 92 U.S. 105 (1876)):

> "...all secret employments of the Government in time of war or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our Government in its public duties, or endanger the person or injure the character of the agent..." cannot be disclosed in a court of law. "A secret service, with liability to publicity in this way, would be impossible;... The secrecy which such

> contracts (of employment) impose precludes any action for their enforcement... It may be stated that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential... greater reason exists for the application of the principle (of not allowing disputes involving state secrets to be aired in court) to cases of contract for secret service with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed."

The Totten case has been repeatedly cited with approval by the Supreme Court. (The most recent case concerning government privileges decided by the Supreme Court was United States v. Reynolds, 345 U.S. 1 (1953) in which Totten was favorably cited. 97 L. ed. 729, 732, 733, 735.)

5. Any suit filed before a court charging a violation of S.1035 would inevitably require assertion of the facts tending to support the violation. These facts are inextricably involved with Agency functions and operations and identities of Agency personnel. On the other hand 50 U.S.C. 403g[section 6 of the CIA Act of 1949, as amended] specifically exempts the Agency from the provisions of any law requiring publication or disclosure of the Agency organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. For example, if an employee stationed abroad

asserted in court a violation of S. 1035 by his superior, the mere identification of the Agency personnel could reveal classified information in violation of the secrecy oath which all employees are required to take, and in itself would be a breach of security contrary to the interests of the United States and possibly endangering lives of people.

6. This then is the crux of the [illegible] the CIA is to be subject to suits to prove its innocence or the innocence of one of its officers, as provided in S. 1035, all efforts to maintain the security of its operations become an exercise in futility. It is apparent that when a court action is maintainable concerning the performance of a service for the Government, despite the secrecy required to perform that service, then the service becomes useless because secrecy is its essence. A mere appearance in court could result in possible disclosure of names and employment relationships, the very existence of which are state secrets. If any employee has a statutory right to a court hearing of his grievance, no matter how wrong or how frivolous his suit may be and no matter how strong the case for the CIA is, once that suit is filed a great disservice has been done to the integrity of the Agency's security system and to its ability to operate anonymously, for the public examination into the grievance is a serious breach of security and in many cases may prove hazardous to the lives of certain classes of Agency employees. It must also be noted when discussing facts which may be revealed in court that it is a determination of the court in any given case as to whether a

particular fact is privileged or is a state secret so that it may be withheld. In other words, if the CIA is sued under section 4 of S. 1035 and the name of any employee who is germane to the case is considered by the Agency to be secret information, it becomes the judge's decision whether that name will be revealed. (United States v. Reynolds, 345 U.S. 1 (1953)) (Government privilege annotated in 95 L. ed. 425, 97 L. ed. 735)

7. Under S. 1035 an employee or applicant who felt he had been aggrieved could go into court alleging a violation of S. 1035. The case would then be subject to the jurisdiction of the court. The problems which this would pose are best demonstrated by a recent case in which a suit was brought against the Agency by the widow of an applicant for employment. Her husband was being considered for Agency employment and went through the normal applicant processing. As a result of a regular medical examination, he was informed that his blood pressure was unacceptably high and that if he would bring it under control his case would be reviewed. A few days later he committed suicide. His wife brought suit against the Agency in a Federal court claiming that during the processing drugs had been administered to her husband which had so depressed him that his suicide resulted. No drugs of any sort are administered in Agency processing and the suit was obviously spurious. To prepare for a defense, however, it was necessary to obtain affidavits from those members of the Office of Security, Office of Personnel and Office of Medical Services who had been in any way involved in the processing.

The very filing of these affidavits in open court would have caused the "publication" of "functions, names [and] official titles" of certain CIA personnel--the very information which the Congress sought to protect by section 6 of the Central Intelligence Agency Act of 1949, as amended. The association of a number of these employees with the Agency was itself classified, and one of the doctors who was on his way to a very sensitive overseas assignment had to be recalled. Another doctor was also slated for such an assignment, which had to be held in abeyance. The widow's lawyer realized, on seeing the affidavits, that he had no case and advised her to withdraw the suit. A less ethical lawyer or a client bound on harrassment of CIA could have forced production of the affidavits in open court. This is just one of a number of cases which could be recited wherein the appearance of an employee or the production of information in judicial procedures resulted or could have resulted in security disclosures detrimental to the national security.

8. These actual cases indicate that once subject to the jurisdiction of a court, the Agency cannot guarantee protection of its sensitive information, particularly as to sources and methods. In a democratic society there will obviously be vital situations where the desirability for protecting sensitive intelligence information may, of necessity, be subordinated to the preservation of justice. On the other

hand, intelligence sources and methods should not be subjected to compromise, by design or otherwise, by a statute which would tend to encourage employees in sensitive positions to jeopardize the security system which they are working to protect. In point of fact, our concern lies not so much with the possibility of revelations by CIA employees but rather by the use which may be made of this administrative remedy by those who seek to destroy our national security systems. If such a statute were applied to CIA, the Agency would be faced with one of two alternatives: to remain silent in the face of charges and concede the merits, or to contest the merits and give away the information which the Director is charged by law to protect.

9. The fact is that although the CIA has some statutory authority (and a clear statutory responsibility) to protect its secret information, these mandates are not always enough when the Agency is brought into court. The obvious question then becomes how much further will the Agency be either harassed frivolously or sued in earnest and damaged under the provisions of S.1035? It is apparent that while the cases to date show serious compromise of classified information under present protective statutes, the probable compromise in the future would be substantially more because of statutory authorizations of suits against the CIA.

10. The American Law Division's report concedes the possibility of conflict between Section 4 of S.1035 and the Director's authority to terminate employees (50 U.S.C. 403(c)). [illegible]

upheld in a number of cases where the individual has sought to contest his termination, Kochan v. Dulles, Civ. No. 2728-58, D. C. D. C. (1959), and Torpats v. McCone, 300 F. 2d 914 (1962), U. S. Court of Appeals for D. C. Circuit. Particularly in the Torpats case the court refused to allow on the record information concerning intelligence operations which the plaintiff knew were classified. Our experience has shown however that a court proceeding cannot be confined solely to the matter of a single allegation, but that all sorts of peripheral and background matters are inevitably brought forward. S. 1035 would virtually force the courts to explore these areas publicly.

11. Possibly an even more clear-cut conflict involves section 201(c) of the CIA Retirement Act of 1964 (P. L. 88-643). That provision states that any determinations made by the Director authorized under the provisions of the CIA Retirement and Disability Act of 1964 "shall be deemed to be final and conclusive and not subject to review by any court." This provision was included in the law because the CIA retirement system covers those employees engaged in the most sensitive work of the Agency, primarily overseas activities, and the committees of the House and the Senate which held hearings on the Act realized the serious harm that would result from a public airing of any such cases.

12. As a hypothetical case, consider an employee who is mandatorily placed in a retired status under the CIA Retirement Act by the Director. Assume further that the employee brings an action in a district court

claiming that his retirement resulted from an interrogation concerning misconduct during which he requested and was refused counsel (section 1(k) of S.1035). Under the provisions of section 4, the employee would be authorized to maintain the action, and the court would review in detail circumstances of the forced retirement. Such a review by the courts would directly conflict with section 201(c) of the CIA Retirement Act, and would result in a public airing of sensitive information which that section was designed to protect. Since S.1035 would be the later-enacted law, a court might hold that section 4 prevailed over the provisions of the CIA Retirement Act.

13. The requirement of presence of counsel or other person provided for in section 1(k) of S.1035 would impose a particularly difficult dilemma. In effect, that section provides that before an employee could be subject to an interrogation which could lead to a disciplinary action, he has the right of counsel or other person of his choice. This statutory requirement could be extremely burdensome administratively. Of more importance, in the case of this Agency where classified information inevitably would be involved, there would be the requirement of investigation of the counsel or other person chosen. If for some reason the counsel or other person were determined to be untrustworthy to receive classified information, the Agency would be in a serious dilemma under S.1035. On the one hand, it has the responsibility to protect intelligence sources and methods, and on

the other hand there is the requirement in S.1035 that counsel or other person be present. In theory then, if the Agency refused to permit the presence of the person designated by the employee during the interrogation which involves the classified information, the complaining employee could allege violation of S.1035 in deprivation of his rights. This is a serious infringement of the Agency's ability to protect classified information.

14. As indicated above, experience has shown that most every court action poses serious problems for the Agency. In order that the processes of law may go forward, there is some dilution of matters that should remain secret. The very concepts of S.1035 in granting rights to employees and applicants to sue and to name individual employees of the Agency as defendants is at the outset inconsistent with the purposes behind the various exemptions granted the Agency to maintain secrecy, as well as the responsibility of the Director to protect intelligence sources and methods. These new rights granted employees of the Agency are furthermore inconsistent with the judicial concepts of protecting state secrets and the special nature of employment in secret activities. On balance, we believe that the desirability of protecting sensitive intelligence information far outweighs the need for relief of the type provided by S.1035 to CIA employees who generally have accepted as a condition of employment the necessity for protecting that information. For these reasons, we believe that a complete exemption from this legislation for this Agency is essential.

privacy invasions, we are not trifling with the great constitutional truths which buttress our society. I believe we are.

Regrettably, it would appear that we have come far from the nature of the truths which we once thought important; but in the case of the polygraph, we have come not very far at all from the ancient methods of seeking the truth. It is not too far from the ancient trial of ordeal by fire or water to the concept of the "wiggle seat." Nor is there much difference between the polygraph and the old deception test used by the Indians. They thought that fear inhibited the secretion of saliva. To test his credibility, an accused was given rice to chew. If he could spit it out he was considered innocent; but if it stuck to his gums he was judged guilty.

What do polygraph techniques do to the concepts underlying the Fourth and Fifth Amendments? To the principles that there shall be no search and seizure without warrant, and that no man should be compelled to incriminate himself? Is there anything more destructive to our system of government than attempting to seize a man's innermost thoughts; compelling him to confess his beliefs, his religious practices, his every sin; requiring him to bare his soul to a machine in order to hold a job?

Hardened criminals are safeguarded in this area of the law, yet an applicant for Federal employment is not.

In the employment process, however, it is to the First Amendment that this twentieth century witchcraft does the most violence. That Amendment guarantees a citizen freedom from interference with his freedom of expression in his thoughts and beliefs. And it includes not only his right to express them but his right to keep silent about them. This is a crucial issue in a free society.

To condition a citizen's employment and his future job prospects on his submission to the pumping of his mind, his thoughts, and beliefs about personal matters unrelated to his duties, is to exercise a form of tyranny and control over his mind which is alien to a society of free men. It is to force conformity of his thought, speech and action to whatever subjective standards for conduct and thought might be held by a polygraph operator, or his company, or an agency official. It is to weaken the fabric of our entire society.

I submit that the Constitution can and does protect us from such incursions on our liberties.

EMPLOYMENT AS A PRIVILEGE

To say that employment is a privilege is to avoid the issue. For, as the Supreme Court has said, it does not matter whether or not there is a constitutional right to employment. The means and procedures employed by government should not be arbitrary.

CONSENT

Nor does it help to reply that a person "consents" to such an invasion of his liberty. Where the full force of government is behind the request, where he knows that great computer and data systems of government will retain forever his refusal to reply, or his answers to the queries, there is no free consent.

CONFIDENTIALITY OF RECORDS

Proponents argue that the records are confidential. It is no secret that his employment records, with all of the medical and security data, follow a man throughout his career. They are officially transmitted through the subterranean passages of our complex bureaucracy.

It was to prevent the practice of such tyrannies on Federal employees that I introduced my bill, S. 1035.

This bill is premised on the belief that just because he goes to work for government, the individual does not surrender his basic rights and liberties as an American. Nor does he render his right to a proper respect by his government for his privacy and other rights. S. 1035 is designed to prohibit unwarranted governmental invasions of employee privacy and is sponsored by 55 Members of the Senate. I am happy to report that it was approved by the Senate on September 13 by a vote of 79 to 4.

Section (f) of S. 1035 makes it unlawful for any officer of any Executive department or agency to require or request, or attempt to require or request, any civilian employee serving in the department or agency, or any person applying for employment in the Executive branch of the United States Government "to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters."

This measure is now pending in a Subcommittee of the House Post Office and Civil Service Committee under the Chairmanship of Congressman David Henderson. I am hopeful that the Congress will enact it promptly.

It is time we put a rein on the Federal Government's use of twentieth century witchcraft to find the truth. It is time the Federal Government was told what truths it should be seeking.

MEMORANDA CONCERNING THE EFFECT S. 1035 ON THE SECURITY AGENCIES

THE LIBRARY OF CONGRESS,
Washington, D.C., January 29, 1968.

To: Senate Subcommittee on Constitutional Rights.
From: American Law Division.
Subject: Effect of S. 1035 on C.I.A. Secrecy.

This is in response to your request for a consideration of the possible effects of S. 1035, to protect the privacy of governmental employees, upon the secrecy of an organization like the Central Intelligence Agency.

A number of statutory provisions are designed to allow the C.I.A. to maintain almost absolute secrecy about its operations and personnel. In 50 U.S.C. § 403(d)(3), the Director of C.I.A. is authorized, *inter alia*, to protect intelligence sources and methods from unauthorized disclosure. The Agency is exempted by 50 U.S.C. § 403g from the provisions of any law requiring the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by it. The Director is authorized, by 50 U.S.C. § 403(c), in his discretion, to terminate the employment of any officer or employee of the Agency whenever he deems it necessary or advisable in the interests of the United States.

Additionally, a series of criminal statutes prohibit unlawful disclosure of confidential information respecting the national defense, 18 U.S.C. §§ 793, 794, 793, 1905. And, finally, it appears that the C.I.A. requires of most if not all of their employees the execution of a secrecy agreement under which the employee swears to maintain in confidence information gained because of his employment and under which it is specifically recognized that an intentional or negligent violation of the agreement might subject the employee to prosecution under at least 18 U.S.C. §§ 793 and 794. See, *Heine* v. *Raus*, 261 F. Supp. 570, 571–572 (D.C.D.Md. 1966).

It is, of course, a rule of statutory construction that when two statutes conflict, the one later in date will govern. Therefore, if any provision of S. 1035, upon enactment, conflicts with any provision of the statutes listed above, S. 1035 would prevail. Would there be any conflict?

In order to protect the privacy of government employees, S. 1035 prohibits those in authority from engaging in certain activities in regard to government employees. The prohibited activities are (1) requiring the disclosure of one's race, religion or national origin or that of his forebears, (2) indicating that the failure of one to attend any assemblage for the purpose of advising, instructing, or indoctrinating in the performance of or in regard to anything other than official duties will be noticed or acted upon, (3) requiring one to participate in activities or undertaking not relating to official duties, (4) requiring one to report on his activities or undertakings not related to his official duties, (5) requiring one to submit to any interrogation or examination designed to elicit information concerning such personal matters as relationships to other people, religious beliefs or practices in sexual matters, (6) requiring the taking of a polygraph test designed to elicit such personal information, (7) requiring one to participate in any way in the support of any person for political office of any political party, (8) requiring one to invest one's money in bonds or other obligations, (9) requiring one to disclose personal finances except in certain conflict of interest situations, (10) requiring or requesting one to participate in any investigation which could have disciplinary consequences without the presence of counsel or other persons of his choice, (11) and discharging or otherwise discriminating against one because of a refusal to comply with a request or demand made illegal by the bill.

Certain provisions of the bill recognize the existence of security interests necessitating deviation from the provisions of the bill. For example, a proviso permits inquiry into the national origin of an employee when deemed necessary or advisable to determine suitability for assignment to activities or undertaking related to the national security of the United States or to activities or undertakings of any nature outside the United States.

And Section 6 of the bill permits the requiring of polygraphing, personality testing or financial inquiry to elicit otherwise impermissible personal information of any employee of the C.I.A., the National Security Agency or the F.B.I. if the Director of the appropriate agency, or his designee, makes a personal finding with regard to each individual to be tested that such test is required to protect the national security.

Enforcement of the act would be placed in a Board of Employee Rights and hence to federal district court.

It appears then that the issue in any matter taken to the Board and to court subsequently would be whether some prohibition of the act had been violated. That is, the only relevant issue to be adjudicated would be whether, for example, someone had been requested or forced to take a polygraph test in regard to his sexual activities and had, perhaps, been discriminated against, by being fired, demoted, or somehow been retaliated against. Thus, it is difficult to see how an issue involving government secrets could be relevant to any determination the Board or court might be called up to make. One possibility might arise should the assignment of an operative be made to attend some assemblage or to take part in some activity be made and refused, for which refusal disciplinary action might follow.

It could be claimed by the affected employee that the requirement violated one or another provision of the act. But it will be noted that such assignments would violate the act only if not part of an employee's "official duties." Should determination of a possible violation depend upon whether or not the assignment involved "official duties," the precedents seem clear that to avoid disclosure of confidential or secret information a court will accept the certification by the Agency head to that effect. *Heine* v. *Raus*, supra 577–78; and, see *United States* v. *Reynolds*, 345 U.S. 1 (1953).

Thus, it would seem that issues involving governmental secrecy would not be relevant to issues before the Board and to a subsequent court. The issues would turn rather

upon whether specific provisions of S. 1035 had been violated.

In regard to the question of any conflict between present statutes and the proposed act, it appears that in all but one instance no conflict would occur. That instance arises with regard to 50 U.S.C. § 403(c), permitting the Director to terminate the employment of any employee or officer in his discretion. Under S. 1035, it would seem that the Director could not terminate employment for a refusal to carry out any request to do anything prohibited by the bill. He could not, for example, fire anyone for refusing to buy U.S. savings bonds. But, as has been noted, the issue would be simply whether this violation was the cause of dismissal or not; no secrets or confidences, no disclosure of any other reason, would have to be made known.

And, as already noted, there are exemptions. The Director may make inquiry of all sorts of personal information if he makes a finding that security requires it. No disclosure would be required of the reason for such a finding, if it became an issue before the Board, only disclosure that the finding had in fact been made.

In short, it appears that enactment of S. 1035 would create no conflict with present statutes nor change any of them, with the limited exception noted above.

JOHNNY H. KILLIAN,
Legislative Attorney.

COMMENTS BY SENATOR ERVIN: WHY THE CIA AND NSA SHOULD NOT BE EXCLUDED FROM THE PROVISIONS OF S. 1035, THE BILL TO PROTECT EMPLOYEE RIGHTS

The Central Intelligence Agency and the National Security Agency have asked that the guarantees in S. 1035 not be extended to their employees or to citizens who apply for employment with those agencies.

I see no practical or policy reasons for granting this request, and find no constitutional grounds for it. It is neither necessary nor reasonable.

The men who drafted the Constitution envisioned a government of laws, not of men. They meant that wherever our national boundaries should reach, there the controls established in the Constitution should apply to the actions of government. The guarantees of the amendments hammered out in the state constitutional conventions and in the meetings of the First Congress had no limitations. They were meant to apply to all Americans; not to all Americans with the exception of those employed by the Central Intelligence Agency and the National Security Agency.

My research has revealed no language in our Constitution which envisions enclaves in Washington, Langley, or Fort Meade, where no law governs the rights of citizens except that of the Director of an agency. Nor have I found any decision of the highest court in the land to support such a proposition.

Why, then, do these agencies want to be exempt from this bill?

Is it that, unbeknown to Congress, their mission is such that they must be able to order their employees to go out and lobby in their communities for open-housing legislation or take part in Great Society poverty programs?

Must they order them to go out and support organizations, paint fences, and hand out grass seeds, and then to come back and tell their supervisors what they did in their spare time and with their weekends?

Do they have occasion to require their employees to go out and work for the nomination or election of candidates for public office? Must they order them to attend meetings and fund-raising dinners for political parties in the United States?

Do they not know how to evaluate a secretary for employment without asking her how her bowels are, if she has diarrhea, if she loved her mother, if she goes to church every week, if she believes in God, if she believes in the second coming of Christ, if her sex life is satisfactory, if she has to urinate more often than other people, what she dreams about, and many other extraneous matters?

Why do these two agencies want the license to coerce their employees to contribute to charity and to buy bonds? The Subcommittee has received fearful telephone calls from employees stating that they were told their security clearances would be in jeopardy if they were not buying bonds, because it was an indication of their lack of patriotism.

Why should Congress grant these agencies the right to spend thousands of dollars to go around the country recruiting on college campuses, and the right to strap young applicants to machines and ask them questions about their family, and personal lives such as:

"When was the first time you had sexual relations with a woman?

"How many times have you had sexual intercourse?

"Have you ever engaged in homosexual activities?

"Have you ever engaged in sexual activities with an animal?

"When was the first time you had intercourse with your wife?

"Did you have intercourse with her before you were married?

"How many times?"

What an introduction to American government for these young people!

The Subcommittee has also received comments from a number of professors indicating the concern on their faculties that their students were being subjected to such practices.

That we are losing the talent of many qualified people who would otherwise choose to serve their government is illustrated by the following letter which was received by Representative Cornelius Gallagher, Chairman of the Special House Government Operations Committee investigation of invasions of privacy:

"I am now a Foreign Service Officer with the State Department and have been most favorably impressed with the Department's security measures.

"However, some years ago I was considered for employment by the CIA and in this connection had to take a polygraph test. I have never experienced a more humiliating situation, nor one which so totally violated both the legal and moral rights of the individual. In particular, I objected to the manner in which the person administering the test posed questions, drew subjective inferences and put my own moral beliefs up for justification. Suffice it to say that after a short time I was not a 'cooperative' subject, and the administrator said he couldn't make any sense from the polygraph and called in his superior, the 'deputy chief.'

"The deputy chief began in patronizing, reassuring tones to convince me that all he wanted was that I tell the truth. I then made a statement to the effect that I had gone to a Quaker school in Philadelphia, that I had been brought up at home and in school with certain moral beliefs and principles, that I had come to Washington from my University at the invitation of the CIA to apply for a position, not to have my statements of a personal and serious nature questioned not only as to their truth but by implication as to their correctness, and that I strongly objected to the way this test was being administered.

"The deputy chief gave me a wise smile and leaning forward said, 'Would you prefer that we used the thumb screws?' (I) I was [illegible] responded that I hardly thought it was a question of either polygraph or the thumb screws.

"This incident almost ended the deep desire I had for service in the American government, but fortunately I turned to the Foreign Service. But if it happened to me it must have happened and be happening to hundreds of other applicants for various Federal positions."

On the subject of polygraphs, the AFL–CIO in 1965 stated:

"The AFL–CIO Executive Council deplores the use of so-called 'lie detectors' in public and private employment. We object to the use of these devices, not only because their claims to reliability are dubious but because they infringe on the fundamental rights of American citizens to personal privacy. Neither the government nor private employers should be permitted to engage in this sort of police state surveillance of the lives of individual citizens."

Legislatures in 5 States and several cities have already outlawed these devices, and many unions have forced their elimination through collective bargaining. The Director of the Federal Bureau of Investigation has said they are unreliable for personnel purposes.

Why should Congress take a step backward by specifically authorizing their continued use on American citizens in these two agencies to ask about their sex lives, their religion, and their family relationships?

Bear in mind that, reprehensible as these lie detectors are, the bill only limits their use in certain areas, and the Director may still authorize their use if he thinks it necessary to protect the national security. Personally, I fear for the national security if its protection depends on the use of such devices.

Similarly, the question may be asked, why should these agencies force their employees to disclose all of their and their families' assets, creditors, personal and real property, unless they are responsible for handling money? Nevertheless, under the bill, the CIA and NSA have been granted the exemption they wished, to require their employees to disclose such information, if the Director says it is necessary to protect the national security. What more do they want?

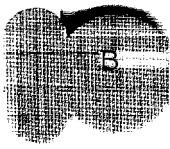
Apparently, what they want is to stand above the law.

Taken all together, their arguments for complete exemption suggest only one conclusion—that they want the unmitigated right to kick Federal employees around, deny them respect for individual privacy and the basic rights which belong to every American regardless of the mission of his agency.

The idea that any government agency is entitled to the "total man" and to knowledge and control of all the details of his personal and community life unrelated to his employment or to law enforcement is more appropriate for totalitarian countries than for a society of free men. The basic premise of S. 1035 is that a man who works for the Federal government sells his services, not his soul.

REPLIES TO CENTRAL INTELLIGENCE AGENCY OBJECTIONS TO S. 1035, A BILL TO PROTECT THE RIGHTS OF FEDERAL EMPLOYEES

The Central Intelligence Agency, in a report which was stamped "secret," stated a number of objections to this bill. At the request of CIA representatives these were also explained to me at length in personal discussions. Their suggestions were carefully considered in Committee and the bill was carefully redrafted and amended to meet them. I believe the agency now has no legitimate complaint other than their natural lack of enthusiasm about being subject to any law. Following is a summary of their objections and the provisions in S. 1035 which meet them. I believe the same arguments will apply to other security positions [illegible] Government. Where those positions are not covered, the Subcommittee must make a policy decision that, subject as they are to Civil Service regulations, they



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28 FEB 1969

The Honorable Sam J. Ervin, Jr., Chairman
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

My dear Mr. Chairman:

I very much appreciate the time you took last Monday to discuss S. 782 with the General Counsel and Legislative Counsel of this Agency.

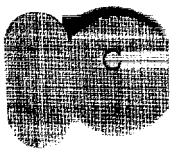
As you know, we still believe there are serious problems connected with certain provisions of this bill. I would, therefore, like an opportunity to present our views to the Subcommittee.

In order to discuss our problem fully and candidly, I would hope you could see your way clear for me to give my testimony in executive session.

Sincerely,

/s/ Richard Helms

Richard Helms
Director



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United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
(PURSUANT TO S. RES. 236, 90TH CONGRESS)
WASHINGTON, D.C. 20510

March 4, 1969

Honorable Richard Helms
Director, Central Intelligence Agency
Washington, D. C.

Dear Mr. Helms:

In response to your letter of February 28, the Subcommittee will be happy to arrange an open hearing so that you may discuss S. 782, the federal employee privacy bill.

Since the Subcommittee's agenda, like my own, is quite full, I would hope this can take place within the next two weeks.

I had thought all the issues were thrashed out two years ago when this proposal was amended to meet the objections of your agency. If there are any others, I hope we can get them cleared up so the bill can be enacted.

With all kind wishes, I am

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.
Chairman

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United States Senate

WASHINGTON, D.C. 20510

March 5, 1969

Honorable Richard Helms
Director
Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Helms:

Notwithstanding the fact that I do not see any way in which the Federal Employees Bill of Rights will substantially disadvantage the CIA in the performance of its duties, I would appreciate it very much if your Counsel would present to me drafts of any proposed amendments which you and he deem essential.

I believe that the CIA now enjoys as totalitarian powers as can be tolerated by a free society, and for this reason, am unwilling to consent to any amendment which would grant the CIA total exemption from a bill which merely attempts to secure to federal employees basic rights belonging to every American.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

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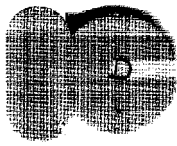

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DRAFT
14 March 1969

The Honorable Sam J. Ervin, Jr., Chairman
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

My dear Mr. Chairman:

In your letter of March 4th responding to my request for a hearing in executive session in connection with S. 782, you state that the Subcommittee would be happy to arrange an open hearing. In your subsequent letter of March 5th you say you would appreciate a draft of any proposed amendments which we deem essential. You further state that you are unwilling to consent to any amendment which would grant CIA total exemption from a bill which merely attempts to secure to Federal employees basic rights belonging to every American.

I wish to make the record clear that my colleagues and I in the Central Intelligence Agency are as keenly interested as any American in protecting the constitutional rights and freedoms of all of our citizens. Most of us joined the Agency in the first place, and continue to work for it, because we believe in the basic democratic freedoms and because we believe in them strongly

enough to be concerned over the threat to these freedoms by external, aggressive forces. Our men undertake difficult and often dangerous missions abroad in the firm conviction that they are helping to preserve the democratic rights of the American people.

It is an undeniable, if unfortunate, fact of life that the international community is neither bound by ironclad guarantees against aggression and subversion nor composed exclusively of peaceful, stable democracies. It is this reality which confronts the U. S. Government, which shapes the mission of the Central Intelligence Agency. In the real world the survival of the United States as a free and democratic state depends on its ability to protect itself against the aggression and subversion of hostile powers.

Survival requires that the forces, the plans, and the weapons with which we would defend ourselves are safeguarded from potential enemies. Similarly, it is vital that we have foreknowledge of the capabilities and intentions of a potential enemy to attack us. And so it is clear that in this struggle which has been forced upon us we have no choice but to ensure the integrity, the high morale, and the competence of the men and women who work with our vital secrets and seek out those of the potential enemy.

The record is clear that the various departments of the U. S. Government responsible for our national security are prime targets for penetration by Communist intelligence services. They have initiated world-wide projects to seek out and recruit Americans--official and private, civilian and military--to conduct penetrations and subversions and acquire this Government's sensitive national security information. We are all too keenly aware of the successes which have been achieved.

The overriding emphasis of our enemies on the recruitment of people, particularly Government employees, may help to explain the significance which must be attached to our ability to rely implicitly on the security, loyalty and integrity of those persons we employ. Such reliance can be possible only if we have the fullest knowledge about each employee so we can assess his integrity, emotional stability under stress, and any weaknesses which might make him susceptible to hostile influence.

I believe S. 782 inhibits our ability to obtain this essential knowledge, but beyond this it provides for certain administrative procedures which raise even more serious problems. As you know, I have statutory responsibility for protecting intelligence sources and methods from unauthorized disclosure. This is a heavy responsibility and important to the national security.

Three provisions of S. 782 are, I believe, in conflict with this responsibility:

Section 1(k) gives any employee the right to counsel or other person of his choice if he is asked to submit to interrogation which could lead to disciplinary action. Such interrogation can involve most sensitive information, particularly as to intelligence sources and methods, and this would permit presence of uncleared and possibly hostile counsel at the earliest stages.

Section 4 gives any employee or applicant who alleges he is affected or aggrieved by the violation or threatened violation of any provision of the act immediate access to the United States District Court without regard to whether such employee or applicant shall have exhausted any administrative remedies which may be provided by law. Again, sensitive information, particularly as to sources and methods, may well be involved and would thus be revealed in open court.

Section 5 establishes a Board on Employees' Rights which would have the authority and duty to receive and investigate written complaints from or on behalf of any person claiming to be affected or aggrieved by any violation

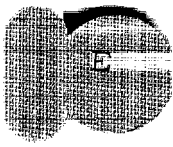
or threatened violation of the act. This would permit airing before this Board situations which might again involve the most sensitive information.

These three administrative provisions are, I believe, in clear conflict with my statutory responsibilities and are unnecessary, as adequate machinery is provided for any employee or applicant for employment who considers himself aggrieved.

A thorough exploration of the foregoing points would necessarily go into the inner workings and detailed operations of the Agency. I believe it would not be in the national interest to do so in an open hearing, but I would be pleased with the opportunity to do so in executive session. The solution which appears to be most nearly consistent with the national security is a complete exemption from the bill for the Central Intelligence Agency and for other sensitive agencies similarly situated. We are, however, preparing language which might eliminate those features of the bill we believe to be seriously objectionable and will submit our suggestions shortly in accordance with your request.

Sincerely,

Richard Helms
Director



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S. 782

The objectives of S. 782 we would all agree are laudable in attempting to assure against unreasonable actions with regard to Government employees. However, as phrased, a number of provisions would have an adverse and disruptive effect on procedures and practices of CIA which have been developed over the years to screen out disloyal or unsuitable employees. The bill would:

1. Preclude the Agency from taking notice of any employee's attendance at a meeting held by a subversive group or organization. [Sec. 1(b) and Sec. 1(d)]

2. Give any employee the right to counsel or other person of his choice if he is asked to submit to interrogation which could lead to disciplinary action. Such interrogation can involve most sensitive information, particularly as to intelligence sources and methods, and this would permit the presence of uncleared and possibly hostile counsel at the earliest stages. [Sec. 1(k)]

3. Would require a personal finding by the Director, or his designee, in each case with respect to certain key questions in polygraph or psychological tests. [Sec. 6] CIA asks these questions of all applicants because it has been determined that they are required to protect national security. It is a fact that literally hundreds of homosexual cases have been uncovered during polygraph interviews where prior full-field investigations had failed to uncover the true situation. The requirement for individual determinations would impose an arbitrary and unnecessary impediment to an otherwise orderly and systematic procedure.

4. Permit an employee or applicant, who alleges that he is affected or aggrieved by any violation or threatened violation of any provision of the act, immediate access to the U.S. district court without regard to whether such employee or applicant shall have exhausted any administrative remedies which may be provided by law. Communists, or other subversives acting on their own or on instructions from foreign agents, could file suits for the sole purpose of harassment based on allegations of improper questioning during recruitment interviews. There is little doubt that such groups would be quick to recognize and exploit the weapon provided by this Section. The mere filing of such complaints let alone a hearing on the merits would involve almost inevitably classified information concerning the Agency and its activities. [Sec. 4] Moreover, a campaign of leftist inspired harassing litigation would seriously burden Agency administrative resources and might virtually paralyze our recruitment program.

5. Establish a Board of Employees' Rights which would have the authority and duty to receive and investigate written complaints from or on behalf of any employee or applicant claiming to be affected or aggrieved by any violation or threatened violation of any provision of the act. This would permit airing before this Board situations which might again involve information which would be detrimental to the national security. In a CIA case it might well be that a defendant employee had been ordered by the Director not to provide information on a matter since it was highly classified; thus, we would have a conflict between the Board's authorities and the Director's responsibility for protection of intelligence sources and methods. [Sec. 5]

These provisions are, we believe, in clear conflict with the statutory responsibilities of the Director of Central Intelligence and are unnecessary, since adequate machinery is provided for any employee or applicant for employment who might consider himself aggrieved.

Approved For Release 2005/12/14 : CIA-RDP72-00337R000400030083-1

91ST CONGRESS
1ST SESSION

S. 782

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 1969

Mr. ERVIN (for himself, Mr. BAYH, Mr. BIBLE, Mr. BROOKE, Mr. BURDICK, Mr. BYRD of Virginia, Mr. CHURCH, Mr. COOK, Mr. COOPER, Mr. DIRKSEN, Mr. DODD, Mr. DOLE, Mr. DOMINICK, Mr. EAGLETON, Mr. FANNIN, Mr. FONG, Mr. GOLDWATER, Mr. GRAVEL, Mr. GURNEY, Mr. HANSEN, Mr. HATFIELD, Mr. HRUSKA, Mr. INOUYE, Mr. JORDAN of North Carolina, Mr. JORDAN of IDAHO, Mr. MCCARTHY, Mr. MCGEE, Mr. MCGOVERN, Mr. MCINTYRE, Mr. MAGNUSON, Mr. MATHIAS, Mr. METCALF, Mr. MILLER, Mr. MONTOYA, Mr. MUNDT, Mr. MUSKIE, Mr. NELSON, Mr. PEARSON, Mr. PERCY, Mr. PROUTY, Mr. PROXMIRE, Mr. RANDOLPH, Mr. SAXBE, Mr. SCHWEIKER, Mr. SCOTT, Mr. SPARKMAN, Mr. SPONG, Mr. STEVENS, Mr. TALMADGE, Mr. THURMOND, Mr. TOWER, Mr. TYDINGS, Mr. WILLIAMS of New Jersey, and Mr. YARBOROUGH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

53 cosponsors

A BILL

To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. It shall be unlawful for any officer of any executive department or any executive agency of the United

States Government, or for any person acting or purporting to act under his authority, to do any of the following things:

(a) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency, or any person seeking employment in the executive branch of the United States Government, to disclose his race, religion, or national origin, or the race, religion, or national origin of any of his forebears: *Provided, however,* That nothing contained in this subsection shall be construed to prohibit inquiry concerning the citizenship of any such employee or person if his citizenship is a statutory condition of his obtaining or retaining his employment: *Provided further,* That nothing contained in this subsection shall be construed to prohibit inquiry concerning the national origin of any such employee when such inquiry is deemed necessary or advisable to determine suitability for assignment to activities or undertakings related to the national security within the United States or to activities or undertakings of any nature outside the United States.

(b) To state or intimate, or to attempt to state or intimate, to any civilian employee of the United States serving in the department or agency that any notice will be taken of his attendance or lack of attendance at any assemblage, discussion, or lecture held or called by any officer of the executive branch of the United States Government, or by any per-

son acting or purporting to act under his authority, or by any outside parties or organizations to advise, instruct, or indoctrinate any civilian employee of the United States serving in the department or agency in respect to any matter or subject other than the performance of official duties to which he is or may be assigned in the department or agency, or the development of skills, knowledge, or abilities which qualify him for the performance of such duties: *Provided, however,* That nothing contained in this subsection shall be construed to prohibit taking notice of the participation of a civilian employee in the activities of any professional group or association.

(c) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency to participate in any way in any activities or undertakings unless such activities or undertakings are related to the performance of official duties to which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties.

(d) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency to make any report concerning any of his activities or undertakings unless such activities or undertakings are related to the performance of

official duties to which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties, or unless there is reason to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties.

(c) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency, or any person applying for employment as a civilian employee in the executive branch of the United States Government, to submit to any interrogation or examination or to take any psychological test which is designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters: *Provided, however,* That nothing contained in this subsection shall be construed to prevent a physician from eliciting such information or authorizing such tests in the diagnosis or treatment of any civilian employee or applicant where such physician deems such information necessary to enable him to determine whether or not such individual is suffering from mental illness: *Provided further, however,* That this determination shall be made in individual cases and not pursuant to general practice or

regulation governing the examination of employees or applicants according to grade, agency, or duties: *Provided further, however,* That nothing contained in this subsection shall be construed to prohibit an officer of the department or agency from advising any civilian employee or applicant of a specific charge of sexual misconduct made against that person, and affording him an opportunity to refute the charge.

(f) To require or request, or attempt to require or request, any civilian employee of the United States serving in the department or agency, or any person applying for employment as a civilian employee in the executive branch of the United States Government, to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters.

(g) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency to support by personal endeavor or contribution of money or any other thing of value the nomination or the election of any person or group of persons to public office in the Government of the United States or of any State, district, Commonwealth, territory, or possession

of the United States, or to attend any meeting held to promote or support the activities or undertakings of any political party of the United States or of any State, district, Commonwealth, territory, or possession of the United States.

(h) To coerce or attempt to coerce any civilian employee of the United States serving in the department or agency to invest his earnings in bonds or other obligations or securities issued by the United States or any of its departments or agencies, or to make donations to any institution or cause of any kind: *Provided, however,* That nothing contained in this subsection shall be construed to prohibit any officer of any executive department or any executive agency of the United States Government, or any person acting or purporting to act under his authority, from calling meetings and taking any action appropriate to afford any civilian employee of the United States the opportunity voluntarily to invest his earnings in bonds or other obligations or securities issued by the United States or any of its departments or agencies, or voluntarily to make donations to any institution or cause.

(i) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency to disclose any items of his property, income, or other assets, source of income, or liabilities, or his personal or domestic expenditures or

those of any member of his family or household: *Provided, however,* That this subsection shall not apply to any civilian employee who has authority to make any final determination with respect to the tax or other liability of any person, corporation, or other legal entity to the United States, or claims which require expenditure of moneys of the United States: *Provided further, however,* That nothing contained in this subsection shall prohibit the Department of the Treasury or any other executive department or agency of the United States Government from requiring any civilian employee of the United States to make such reports as may be necessary or appropriate for the determination of his liability for taxes, tariffs, custom duties, or other obligations imposed by law.

(j) To require or request, or to attempt to require or request, any civilian employee of the United States embraced within the terms of the proviso in subsection (i) to disclose any items of his property, income, or other assets, source of income, or liabilities, or his personal or domestic expenditures or those of any member of his family or household other than specific items tending to indicate a conflict of interest in respect to the performance of any of the official duties to which he is or may be assigned.

(k) To require or request, or to attempt to require or

request, any civilian employee of the United States serving in the department or agency, who is under investigation for misconduct, to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests.

(l) To discharge, discipline, demote, deny promotion to, relocate, reassign, or otherwise discriminate in regard to any term or condition of employment of, any civilian employee of the United States serving in the department or agency, or to threaten to commit any of such acts, by reason of the refusal or failure of such employee to submit to or comply with any requirement, request, or action made unlawful by this Act, or by reason of the exercise by such civilian employee of any right granted or secured by this Act.

SEC. 2. It shall be unlawful for any officer of the United States Civil Service Commission, or for any person acting or purporting to act under his authority, to do any of the following things:

(a) To require or request, or to attempt to require or request, any executive department or any executive agency of the United States Government, or any officer or employee serving in such department or agency, to violate any of the provisions of section 1 of this Act.

(b) To require or request, or to attempt to require or

request, any person seeking to establish civil service status or eligibility for employment in the executive branch of the United States Government, or any person applying for employment in the executive branch of the United States Government, or any civilian employee of the United States serving in any department or agency of the United States Government, to submit to any interrogation or examination or to take any psychological test which is designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters: *Provided, however,* That nothing contained in this subsection shall be construed to prevent a physician from eliciting such information or authorizing such tests in the diagnosis or treatment of any civilian employee or applicant where such physician deems such information necessary to enable him to determine whether or not such individual is suffering from mental illness: *Provided further, however,* That this determination shall be made in individual cases and not pursuant to general practice or regulation governing the examination of employees or applicants according to grade, agency, or duties: *Provided further, however,* That nothing contained in this subsection shall be construed to prohibit an officer of

the Civil Service Commission from advising any civilian employee or applicant of a specific charge of sexual misconduct made against that person, and affording him an opportunity to refute the charge.

(c) To require or request, or to attempt to require or request, any person seeking to establish civil service status or eligibility for employment in the executive branch of the United States Government, or any person applying for employment in the executive branch of the United States Government, or any civilian employee of the United States serving in any department or agency of the United States Government, to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters.

SEC. 3. It shall be unlawful for any commissioned officer, as defined in section 101 of title 10, United States Code, or any member of the Armed Forces acting or purporting to act under his authority, to require or request, or to attempt to require or request, any civilian employee of the executive branch of the United States Government under his authority or subject to his supervision to perform any of the acts or submit to any of the requirements made unlawful by section 1 of this Act.

SEC. 4. Whenever any officer of any executive department or any executive agency of the United States Government, or any person acting or purporting to act under his authority, or any commissioned officer as defined in section 101 of title 10, United States Code, or any member of the Armed Forces acting or purporting to act under his authority, violates or threatens to violate any of the provisions of section 1, 2, or 3 of this Act, any civilian employee of the United States serving in any department or agency of the United States Government, or any person applying for employment in the executive branch of the United States Government, or any person seeking to establish civil service status or eligibility for employment in the executive branch of the United States Government, affected or aggrieved by the violation or threatened violation, may bring a civil action in his own behalf or in behalf of himself and others similarly situated, against the offending officer or person in the United States district court for the district in which the violation occurs or is threatened, or the district in which the offending officer or person is found, or in the United States District Court for the District of Columbia, to prevent the threatened violation or to obtain redress against the consequences of the violation. The Attorney General shall defend all officers or persons sued under this section who acted pursuant to an order, regulation, or directive,

or who, in his opinion, did not willfully violate the provisions of this Act. Such United States district court shall have jurisdiction to try and determine such civil action irrespective of the actuality or amount of pecuniary injury done or threatened, and without regard to whether the aggrieved party shall have exhausted any administrative remedies that may be provided by law, and to issue such restraining order, interlocutory injunction, permanent injunction, or mandatory injunction, or enter such other judgment or decree as may be necessary or appropriate to prevent the threatened violation, or to afford the plaintiff and others similarly situated complete relief against the consequences of the violation. With the written consent of any person effected or aggrieved by a violation or threatened violation of section 1, 2, or 3 of this Act, any employee organization may bring such action on behalf of such person, or may intervene in such action. For the purposes of this section, employee organizations shall be construed to include any brotherhood, council, federation, organization, union, or professional association made up in whole or in part of civilian employees of the United States and which has as one of its purposes dealing with departments, agencies, commissions, and independent agencies of the United States concerning the condition and terms of employment of such employees.

SEC. 5. (a) There is hereby established a Board on

Employees' Rights (hereinafter referred to as the "Board"). The Board shall be composed of three members, appointed by the President, by and with the advice and consent of the Senate. The President shall designate one member as chairman. No more than two members of the Board may be of the same political party. No member of the Board shall be an officer or employee of the United States Government.

(b) The term of office of each member of the Board shall be five years, except that (1) of those members first appointed, one shall serve for five years, one for three years, and one for one year, respectively, from the date of enactment of this Act, and (2) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(c) Members of the Board shall be compensated at the rate of $75 a day for each day spent in the work of the Board, and shall be paid actual travel expenses and per diem in lieu of subsistence expenses when away from their usual places of residence, as authorized by section 5703 of title 5, United States Code.

(d) Two members shall constitute a quorum for the transaction of business.

(e) The Board may appoint and fix the compensation

of such officers, attorneys, and employees, and make such expenditures, as may be necessary to carry out its functions.

(f) The Board shall make such rules and regulations as shall be necessary and proper to carry out its functions.

(g) The Board shall have the authority and duty to receive and investigate written complaints from or on behalf of any person claiming to be affected or aggrieved by any violation or threatened violation of this Act and to conduct a hearing on each such complaint. Within ten days after the receipt of any such complaint, the Board shall furnish notice of the time, place, and nature of the hearing thereon to all interested parties. The Board shall render its final decision with respect to any complaint within thirty days after the conclusion of its hearing thereon.

(h) Officers or representatives of any Federal employee organization in any degree concerned with employment of the category in which any alleged violation of this Act occurred or is threatened shall be given an opportunity to participate in each hearing conducted under this section, through submission of written data, views, or arguments, and in the discretion of the Board, with opportunity for oral presentation. Government employees called upon by any party or by any Federal employee organization to participate in any phase of any administrative or judicial proceeding under this section shall be free to do so without incurring

travel cost or suffering loss in leave or pay; and all such employees shall be free from restraint, coercion, interference, intimidation, or reprisal in or because of their participation. Any periods of time spent by Government employees during such participation shall be held and considered to be Federal employment for all purposes.

(i) Insofar as consistent with the purposes of this section, the provisions of subchapter II of chapter 5 of title 5, United States Code, relating to the furnishing of notice and manner of conducting agency hearings, shall be applicable to hearings conducted by the Board under this section.

(j) If the Board shall determine after hearing that a violation of this Act has not occurred or is not threatened, the Board shall state its determination and notify all interested parties of such determination. Each such determination shall constitute a final decision of the Board for purposes of judicial review.

(k) If the Board shall determine that any violation of this Act has been committed or threatened by any civilian officer or employee of the United States, the Board shall immediately (1) issue and cause to be served on such officer or employee an order requiring such officer or employee to cease and desist from the unlawful act or practice which constitutes a violation, (2) endeavor to eliminate any such

unlawful act or practice by informal methods of conference, conciliation, and persuasion, and (3) may—

(A) (i) in the case of the first offense by any civilian officer or employee of the United States, other than any officer appointed by the President, by and with the advice and consent of the Senate, issue an official reprimand against such officer or employee or order the suspension without pay of such officer or employee from the position or office held by him for a period of not to exceed fifteen days, and (ii) in the case of a second or subsequent offense by any such officer or employee, order the suspension without pay of such officer or employee from the position or office held by him for a period of not to exceed thirty days or order the removal of such officer or employee from such position or office; and

(B) in the case of any offense by any officer appointed by the President, by and with the advice and consent of the Senate, transmit a report concerning such violation to the President and the Congress.

(l) If the Board shall determine that any violation of this Act has been committed or threatened by any officer of any of the Armed Forces of the United States, or any person purporting to act under authority conferred by such officer, the Board shall (1) submit a report thereon to the

President, the Congress, and the Secretary of the military department concerned, (2) endeavor to eliminate any unlawful act or practice which constitutes such a violation by informal methods of conference, conciliation, and persuasion, and (3) refer its determination and the record in the case to any person authorized to convene general courts-martial under section 822 (article 22) of title 10, United States Code. Thereupon such person shall take immediate steps to dispose of the matter under chapter 47 of title 10, United States Code (Uniform Code of Military Justice).

(m) Any party aggrieved by any final determination or order of the Board may institute, in the district court of the United States for the judicial district wherein the violation or threatened violation of this Act occurred, or in the United States District Court for the District of Columbia, a civil action for the review of such determination or order. In any such action, the court shall have jurisdiction to (1) affirm, modify, or set aside any determination or order made by the Board which is under review, or (2) require the Board to make any determination or order which it is authorized to make under subsection (k), but which it has refused to make. The reviewing court shall set aside any finding, conclusion, determination, or order of the Board as to which complaint is made which is unsupported by substantial evidence on the record considered as a whole.

(n) The Board shall submit, not later than March 31 of each year, to the Senate and House of Representatives, respectively, a report on its activities under this section during the immediately preceding calendar year, including a statement concerning the nature of all complaints filed with it, its determinations and orders resulting from hearings thereon, and the names of all officers or employees of the United States with respect to whom any penalties have been imposed under this section.

(o) There are authorized to be appropriated sums necessary, not in excess of $100,000, to carry out the provisions of this section.

SEC. 6. Nothing contained in this Act shall be construed to prohibit an officer of the Central Intelligence Agency or of the National Security Agency or of the Federal Bureau of Investigation from requesting any civilian employee or applicant to take a polygraph test, or to take a psychological test, designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters, or to provide a personal financial statement, if the Director of the Central Intelligence Agency or his designee or the Director of the National Security Agency or his designee or the Director

of the Federal Bureau of Investigation or his designee makes a personal finding with regard to each individual to be so tested or examined that such test or information is required to protect the national security.

SEC. 7. Nothing contained in sections 4 and 5 shall be construed to prevent establishment of department and agency grievance procedures to enforce this Act, but the existence of such procedures shall not preclude any applicant or employee from pursuing the remedies established by this Act or any other remedies provided by law: *Provided, however,* That if under the procedures established, the employee or applicant has obtained complete protection against threatened violations or complete redress for violations, such action may be pleaded in bar in the United States District Court or in proceedings before the Board on Employee Rights: *Provided further, however,* That if an employee elects to seek a remedy under either section 4 or section 5, he waives his right to proceed by an independent action under the remaining section.

SEC. 8. If any provision of this Act or the application of any provision to any person or circumstance shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

91ST CONGRESS
1ST SESSION

S. 782

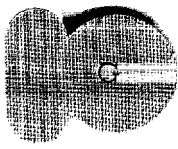
A BILL

To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy.

By Mr. ERVIN, Mr. BAYH, Mr. BIBLE, Mr. BROOKE, Mr. BURDICK, Mr. BYRD of Virginia, Mr. CHURCH, Mr. COOK, Mr. COOPER, Mr. DIRKSEN, Mr. DODD, Mr. DOLE, Mr. DOMINICK, Mr. EAGLETON, Mr. FANNIN, Mr. FONG, Mr. GOLDWATER, Mr. GRAVEL, Mr. GURNEY, Mr. HANSEN, Mr. HATFIELD, Mr. HRUSKA, Mr. INOUYE, Mr. JORDAN of North Carolina, Mr. JORDAN of Idaho, Mr. MCCARTHY, Mr. MCGEE, Mr. MCGOVERN, Mr. MCINTYRE, Mr. MAGNUSON, Mr. MATHIAS, Mr. METCALF, Mr. MILLER, Mr. MONTOYA, Mr. MUNDT, Mr. MUSKIE, Mr. NELSON, Mr. PEARSON, Mr. PERCY, Mr. PROUTY, Mr. PROXMIRE, Mr. RANDOLPH, Mr. SAXBE, Mr. SCHWEIKER, Mr. SCOTT, Mr. SPARKMAN, Mr. SPONG, Mr. STEVENS, Mr. TALMADGE, Mr. THURMOND, Mr. TOWER, Mr. TYDINGS, Mr. WILLIAMS of New Jersey, and Mr. YARBOROUGH

JANUARY 31, 1969

Read twice and referred to the Committee on the Judiciary



AMENDMENTS TO S. 782

Page 19, line 2, following "finding" delete "with regard to each individual to be so tested or examined."

Page 19, following line 19, insert a new paragraph:

"8. Section 1(b), 1(d), 1(k), and 1(l), and Sections 4 and 5 of this Act shall not apply to the FBI, NSA, CIA, or to persons employed by, or detailed to, such agencies.

Page 19, line 20, renumber to read SEC. 9.

(These amendments would eliminate all the provisions troubling the Agency and leave certain limitations which are no problem. They are, therefore, tantamount to a complete exemption.)

21 February 1969

MEMORANDUM FOR: The Director

SUBJECT: Ervin Bill - S. 782

Bill Woodruff, Scoop Jackson, among others, have suggested you might want to mention at an early Subcommittee session the problem of the Ervin bill (S. 782 to protect the constitutional rights and privacy of Government employees). I hope you find a chance to do this and if so suggest you make the following points:

1. Our Subcommittee is certainly well aware of the sensitivity of the kind of material we handle and the kind of operations we engage in.

2. It is also aware of the Director's statutory responsibility to protect our sources and methods.

3. We need only look at some of the past experiences of U.S. agencies (NSA cases for example) and cases of friendly foreign countries [redacted] to see the incalculable damage done by successful Soviet penetrations of free world intelligence organizations. 25X1

4. Indeed we have a mass of evidence that one of the highest priorities of the KGB is the penetration of U.S. intelligence agencies. One successful such penetration might enable the Soviets to identify and neutralize many of our own operations; learn what we know and don't know about Soviet capabilities and intentions; gain insights enabling them to confuse and deceive us; and acquire vital information about U.S. policy, capabilities, technology, etc., with which our own personnel become familiar in the course of their work.

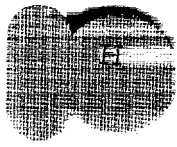
5. For these reasons we are very seriously concerned about the implications of certain provisions of the Ervin bill:

a. As you know, over the years we have developed a thorough system of screening and assessing our personnel. If we didn't carefully check their security and suitability, we wouldn't be doing our duty. The Ervin bill would severely limit us in this regard. It apparently would forbid us to question an employee regarding his association with known Communist agents.

b. Perhaps even more serious, provisions of the bill grant any employee whose performance has been brought into question, the right to bring in private counsel at the very outset of an inquiry and to appeal his case to a U.S. district court. In such cases we would be faced with the problem of either letting command authority and discipline fall apart, or going to public trial and being forced to reveal a great deal more about the Agency and its operations than we would want.

Especially troublesome too is the provision allowing any applicant the right to file suit in a district court for alleged violations or threatened violations of the provisions of the bill (i.e., questioning an applicant about his personal life). Under these provisions, leftist organizations, dissident youth groups, etc., could launch a campaign of litigation virtually paralyzing the Agency recruitment program and severely straining its administrative resources.

JOHN M. MAURY
Legislative Counsel



Approved For Release 2005/12/14 : CIA-RDP72-00337R000400030083-1